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APPENDIX A

(1) Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

UNITED BISCUIT COMPANY OF AMERICA, Petitioner,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

No. 14639

Aug. 9, 1965.

Before HASTINGS, Chief Judge, and DUFFY and SWYGERT, Circuit Judges.

SWYGERT, Circuit Judge:

Petitioner United Biscuit Company of America seeks review of a cease and desist order of the Federal Trade Commission and a subsequent order of the Commission denying a stay of the cease and desist order. The Commission found petitioner guilty of violating section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).[1]

United is a Delaware corporation with its principal office and place of business in Melrose Park, Illinois. It manufactures and sells cookies and crackers, referred to collectively as biscuit products. Petitioner conducts its operations through eight geographical divisions. The Sawyer Division covers an area comprising Illinois, and portions of Indiana, Iowa, Wsconsin, Michigan, Kentucky, and Missouri.

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[1] Section 2(a) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition * * *.

The activities investigated by the Commission dealt with sales by the Sawyer Division to its retail grocery store customers during the year 1959. These customers can be divided into those owning and operating only one grocery store, referred to in the complaint as "independents," and those owning and operating more than one store, referred to as "chains." The latter include major corporate chains, such as The Great Atlantic & Pacific Tea Company, The Kroger Company, and National Food Stores, as well as smaller corporate or individually owned chains.

The complaint charged that the Sawyer Division used graduated monthly discount schedules to discriminate in price between its customers; that these schedules, allowing for discounts up to six per cent, were based on the dollar volume of purchases made by each store; and that if a purchaser had more than one store, such as a corporate chain, its discount was calculated on the basis of the aggregated purchases of the stores operated by that purchaser. As a result, it was alleged, individual outlets of the chains as well as supermarkets (large independents) were enabled to earn larger discounts than competing smaller independents. In its answer, United admitted that its Sawyer Division priced pursuant to the challenged discount schedules, and that some of Sawyer's purchasers "who own only one retail grocery store may from time to time receive no discount or less than six per cent depending on the volume of their purchases, and that the volume of their purchases may be more than those for an individual store owned by purchasers owning more than one such store." United did not attempt to defend its policy by urging cost justification or a meeting of competition.

The Commission's case with respect to the actual operation of petitioner's discount practices was based on the purchases made and the discounts earned during two separate three-month periods of 1959 by thirteen independent

stores and by a few chain store outlets located in portions of three communities served by the Sawyer Division—Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. The purchases and discounts for each test store during the six months involved are not in dispute. They are set out at length in the record.[2] They indicate that most

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[2] The following is a representative example of the discount payments made to the test stores:

GARY, INDIANA

STORE	Monthly Purchases	Per Cent Discount	Discount Payable	Additional Amount Payable at 6%
January 1959				
Independents:				
Better Foods, Inc.	$ 11.67	0	$ 0.00	$ .70
Gene's Super Market	117.16	5	5.86	1.17
Tobe's Super Market	319.42	6	19.17	—
Wally's Fifth Ave. Mart	45.37	4	1.81	.91
Chains:				
A & P	82.61	6	4.96	—
Kroger Store No. 628	43.42	6	2.61	—
February 1959				
Independents:				
Better Foods, Inc.	18.82	0	0.00	1.13
Gene's Super Market	116.38	5	5.82	1.16
Tobe's Super Market	333.97	6	20.04	—
Wally's Fifth Ave. Mart	43.21	3	1.30	1.29
Chains:				
A & P	62.79	6	3.77	—
Kroger Store No. 628	47.28	6	2.84	—
March 1959				
Independents:				
Better Foods, Inc.	41.68	3	1.25	1.25
Gene's Super Market	130.95	6	7.86	—
Tobe's Super Market	439.88	6	26.39	—
Wally's Fifth Ave. Mart	33.19	2	.66	1.33
Chains:				
A & P	83.13	6	4.99	—
Kroger Store No. 628	103.94	6	6.24	—

of the major retail grocery stores and a few of the large independents received a 6 per cent volume discount. Other stores received discounts varying from 1½ per cent to 5 per cent. Some received no discount. The Commission found that as a result of the differences in the volume discounts, United charged some customers a higher price for

GARY, INDIANA

STORE	Monthly Purchases	Per Cent Discount	Discount Payable	Additional Amount Payable at 6%
October 1959				
Independents:				
Better Foods, Inc.	28.35	1½	.42	1.28
Gene's Super Market	66.63	2½	1.67	2.33
Tobe's Super Market	170.71	6	10.24	—
Wally's Fifth Ave. Mart	24.78	0	0.00	1.49
Chains:				
A & P	26.28	6	1.58	—
Kroger Store No. 628	123.27	6	7.40	—
November 1959				
Independents:				
Better Foods, Inc.	25.02	1½	.38	1.12
Gene's Super Market	138.92	5	6.95	1.39
Tobe's Super Market	99.93	3½	3.50	2.50
Wally's Fifth Ave. Mart	26.64	1½	.40	1.20
Chains:				
A & P	50.60	6	3.04	—
Kroger Store No. 628	.56	6	0.03	—
December 1959				
Independents:				
Better Foods, Inc.	21.86	0	0.00	1.31
Gene's Super Market	106.05	3½	3.71	2.65
Tobe's Super Market	0.00	0	0.00	—
Wally's Fifth Ave. Mart	58.30	2	1.17	2.33
Chains:				
A & P	57.33	6	3.44	—
Kroger Store No. 628	14.86	6	0.89	—

like goods than it charged a competing customer or competing customers.

After counsel in support of complaint had rested his case in chief, United moved to dismiss the complaint. The hearing examiner granted the motion on the ground that although United's pricing practices "may constitute a price discrimination under § 2(a) of the Clayton Act," the Commission had not "sustained the burden of proof of competitive injury imposed upon [it] by law."

On appeal by counsel in support of the complaint, the Commission set aside the examiner's decision and remanded the case to him, stating that unless the showing on the record was "rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist. * * *" No further evidence was introduced by either party. Upon remand the examiner issued a new initial decision and concluded that a violation of section 2(a) had been established. He issued an order requiring that United:

> [I]n connection with the sale and distribution of * * * [its] products, including cookies and crackers * * * cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price.

United thereupon petitioned the Commission to review the hearing examiner's decision, challenging the sufficiency of the evidence and the findings as showing a violation of the Act, and also objecting to the scope of the examiner's order.

During the pendency of the review proceeding before the Commission, United filed a motion for certain com-

pliance reports filed with the Commission by National Biscuit Company and Sunshine Biscuits, Inc., the two major competitors of United. United alleged that National and Sunshine appeared to be granting quantity discounts on biscuit products to their retail grocery customers despite the existence of certain outstanding cease and desist orders against them, and that issuance of an order against United banning all purchase discounts would place petitioner at a competitive disadvantage. The Commission denied the request for disclosure stating that the reports had not been acted upon by it and that, in any event, there had been an insufficient showing that the orders in the other cases were relevant to this case since "each matter before the Commission must be considered on its own merits."

The Commission thereafter issued its final opinion. It adopted the examiner's findings and conclusions with minor modifications not pertinent to the instant review. The Commission concluded that United's price discriminations "may be substantially to lessen competition * * * and to injure, destroy, and prevent competition * * *" and that accordingly United had violated section 2(a) of the Clayton Act. In formulating its cease and desist order, the Commission modified the examiner's order by substituting for the phrase "their products, including cookies and crackers" the phrase "their food products," and limited the order to sales to purchasers competing in the resale of petitioner's products, but rejected United's contention that the order should be limited to "biscuit products." The Commission in its decision rejected petitioner's contention that the violation of the Act found here consisted only of favoring chains as against independents by permitting the former to combine the purchases of their outlets. It held that there was "a violation shown with or without the evidence of the combining of chain purchases." The Commission also rejected petitioner's

request that the order be limited so as to cover only this practice.

United thereafter moved the Commission to withdraw entry of its order and to stay its re-entry until the Commission had completed the proceedings pending against National and Sunshine. This motion was denied. United then filed the instant petition for review.

United raises three separate issues: (1) whether the Commission's finding that petitioner's pricing practices may be to adversely affect customer competition is supported by substantial evidence; (2) whether the Commission's order is too broad in its scope; and (3) whether the Commission abused its discretion by refusing to stay the effective date of its order until it had passed upon the compliance by petitioner's competitors with orders issued against them.

I.

Section 2 (a) of the Clayton Act prohibits price discriminations when the effect "*may be substantially* to lessen competition * * * or to injure, destroy, or prevent competition." (Emphasis added). In applying the statute, this court in Whitaker Cable Corp. v. F.T.C., 239 F.2d 253, 256 (7th Cir. 1956), cert. denied, 353 U.S. 938, 77 S.Ct. 813, 1 L.Ed.2d 761 (1957), said that price differentials *per se* are not outlawed. "The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial." It is also important, however, to remember that price discriminations do not need to have resulted in actual injury in order to come within the statutory ban. "It is enough that they may have the prescribed effect." E. Edelman & Co. v. F.T.C., 239 F.2d 152, 154 (7th Cir. 1956), cert. denied, 355 U.S. 941, 78 S.Ct. 426, 2 L.Ed.2d 422 (1958). Thus the statute seeks "to reach such discriminations 'in their incipiency,' before

the harm to competition is effected." Corn Products Refining Co. v. F.T.C., 324 U.S. 726, 738, 65 S.Ct. 961, 967, 89 L.Ed. 1320 (1945).

United contends that the evidence does not support the finding that its discount practices result in price discriminations that may substantially lessen competition. It says that the discounts are, under any view, insubstantial. It maintains that the small dollar amounts earned by those customers granted discounts are minimal even when they constitute the maximum six per cent discount. Consequently, United argues that the discounts, particularly when translated into dollar amounts, are incapable of producing any anticompetitive effect.

We realize that the dollar amounts representing the discount differentials are small and not as great as those found in many prosecutions for section 2(a) Clayton Act violations. Nevertheless, for reasons hereinafter given, we think there was sufficient evidentiary support for the Commission's finding that there was a likelihood of substantial anticompetitive injury.

The fact that the discounts granted by United increase up to six percent belies the claim that the price differentials as such are insubstantial. The apparent purpose of a graduated discount system is to afford some customers greater profits. As the volume of a customer's purchases grows the percentage of his discount increases, resulting in the opportunity either to realize a greater margin of profit per package or to reduce his retail price in relation to his competitors. There would seem to be no purpose for United to burden itself with maintaining its pricing practices unless it believed that the discounts are sufficiently attractive to induce a greater volume of purchases from its customers. It follows that if the discounts are intended as an inducement, necessarily they must be considered of a substantial character.

United correctly points out, however, that the "substantiality" requirement of the statute relates not to the price differentials, but to their effect upon competition. It then charges that the Commission ignored this distinction by holding that substantial injury to competition may be inferred if the discount to one customer is substantially more than that given his competitors. In other words, United argues that in effect the Commission applied a *per se* test in finding that the anticompetitive effect of petitioner's pricing practices would be substantial rather than minimal. We are convinced, however, that the Commission did not make the finding solely on the basis of the differences in the percentages of the discounts or of the amounts of the discriminations. All of the facts and circumstances of the case, including the amount of the discounts, were considered by the Commission in reaching its conclusion.

Independent store owners testified generally as to the highly competitive nature of the retail food business and that net profits are low; consequently, cash discounts and other allowances are important. One store owner testified "[W]e have to fight not only for pennies but for fractions." Moreover, certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There was also testimony from these witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the overall picture, buy where the prices are lower. The Commission said that "considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6% • • • was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%." The Commission concluded that there was sufficient evidence "to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent

[United] substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations."

United claims that the majority of independent store owners who testified stated that they would not be adversely affected by the discount differentials received on United's products. In this connection petitioner calls attention to the examiner's statement:

> The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

Regardless of this, we are of the opinion that the "substantiality" question here does not depend upon the store owners' estimation of the possibility of injury by reason of United's pricing practices. The incipient harm to competition that may be present if the challenged discriminations should continue is not to be determined solely by the opinions of the store owners. That determination must be made by the Commission through an exercise of its special competence and upon the basis of all the attendant facts and circumstances with particular reference to the type of business under investigation.

We are in agreement with the Commission that the test for competitive injury set forth in F.T.C. v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948), should govern this proceeding. There, the Court was confronted with the sale of an item, which like those in the present case, was a relatively minor one when considered in the

overall operations of a retail grocery store. Nevertheless, in prohibiting the price discriminations found in that case, the Court said:

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store. Supra at 49, 68 S.Ct. at 829.

United argues that Morton Salt holds that competitive injury caused by discounts given on one product cannot be justified merely because the customer deals in many other products. It is true that this is one possible interpretation of the Court's language. It is possible, however, to find in it a quite different meaning, namely, that even though price discriminations covering a single item in a grocery store may appear relatively insignificant when considered alone, they may assume the stature of substantiality when considered in the context of the store's total operation and as an incipient harm which could grow into reality if extended to all of the items handled by the grocer. We believe that this latter interpretation is the correct one and that it should be adopted in testing the likelihood of substantial competitive harm inherent in United's pricing practices.

United also contends that the Commission's order extends beyond those price discriminations challenged in the complaint, that is, that it has ruled illegal all price discriminations using the volume discount schedules and

did not limit the illegality to those discriminations that arose from its practice of allowing chains to combine the purchases of their various outlets located within a particular area. We have read the complaint and examined the record. We find that the Commission's order is consistent with its complaint and with the theory on which it prosecuted this case. We agree with the Commission's statement: "The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases."

II.

United next challenges the Commission's order as being too broad in its scope: (1) in its products coverage by issuing an order covering "food products" rather than "cookies and crackers" and (2) in its prohibition of practices by not restricting the order to the price discriminations arising from the outlet-combining aspect of its discount schedules.

Having found that there was warrant for the Commission's finding that United violated section 2(a) in the distribution of its biscuit products, we hold that the Commission was authorized to fashion its order to prohibit United's use of such illegal practices in the distribution of any of its "food products." In other cases it has been held that it is reasonable for the Commission to frame its order in such a way as to prohibit practices found to be illegal in the sale of one product in conjunction with the sale of other products. F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); Niresk Indus. v. F.T.C., 278 F.2d 337 (7th Cir. 1960), cert. denied, 364 U.S. 883, 81 S.Ct. 173, 5 L.Ed.2d 104.

In challenging the broad formulation of product coverage, United cites F.T.C. v. Henry Broch & Co., 368 U.S. 360, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962), as authority for the proposition that the 1959 amendments to section 11 of the Clayton Act require that the Commission orders be very narrow and precise.[8] It should be noted, however, that the language quoted from Broch by petitioner here did not refer to that part of the order in Broch relating to broad product coverage. The recent decision in Colgate-Palmolive Co., supra, indicates that Broch cannot be held as authority for the proposition which petitioner urges.

United also challenges the Commission's order as being too broad in prohibiting all price discriminations resulting from the use of volume discount schedules and not limiting it to those situations in which the purchases of multiple chain outlets in a particular area were combined for the purpose of discounts. This argument is consistent with petitioner's contention that this proceeding was limited to the outlet-combining aspect of the discount schedules. Having determined as we have earlier that the Commission's decision was consistent with the complaint and the theory on which it prosecuted this case, we now rule that the order is not too broad in its prohibitions but covers those practices which United was found to have used and which were determined to be violative of the Act.

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[8] Petitioner cites the following from F.T.C. v. Henry Broch & Co., 368 U.S. 360, 367-368, 82 S.Ct. 431, 436 (1962):

> We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

III.

Petitioner contends that the Commission erred in refusing to stay the effective date of its order until the Commission has completed its pending proceedings against petitioner's competitors. In earlier proceedings, the Commission prohibited both National Biscuit Company and Sunshine Biscuits, Inc. from offering the type of price discounts similar to those used by United. Both of these competitors have now submitted compliance reports to the Commission which has not as yet determined whether the reports establish compliance. Petitioner urges that the order against it should not issue until it has been determined whether or not its competitors are complying with the Commission's orders. If they are not, petitioner argues, and if United does comply with the present order against it, it will be placed at a serious competitive disadvantage. We agree with the Commission that the compliance or noncompliance of the other companies is a separate question which ought to be considered on its own merits. The commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected. The "decision as to whether or not an order against one firm * * * should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission." Moog Indus., Inc. v. F.T.C., 355 U.S. 411, 413, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958).

The Commission's orders are affirmed and the cease and desist order will be enforced.

(2) Final Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, August 9, 1965

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

No. 14639

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for review of orders of the Federal Trade Commission.

This cause came on to be heard on the petition for review of orders of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the orders entered by the Federal Trade Commission on February 7, 1964 and April 10, 1964 be, and the same are hereby AFFIRMED, and the cease and desist order will be enforced, in accordance with the opinion of this Court filed this day. Upon presentation, an appropriate decree will be entered.

APPENDIX B

(1) First Initial Decision

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

INITIAL DECISION AS TO COUNT I.

Leon R. Gross, Hearing Examiner.

Ross, McGowan & O'Keefe, by Roland D. Whitman, Esq., of Chicago, Illinois, for Respondent.

Cecil G. Miles, Esq., Counsel Supporting the Complaint.

This complaint, issued on March 10, 1960, charged respondent in Count I with violation of §2(a) of the Clayton Act as amended, and in Count II with violation of §2(d) of the Act. On August 30, 1961, the Federal Trade Commission vacated and remanded an initial decision of July 20, 1961, which dismissed the charges in Count I of the complaint.

The Commission vacated the aforesaid decision because the hearing examiner had not made a finding under §3.8 (e) of the Commission's Rules that granting respondent's motion to dismiss Count I terminated the proceeding before him. That decision of July 20, 1961, did not terminate the proceedings before the examiner because Count II, which charged a violation of § 2(d) of the Act, was then undisposed. Counsel had agreed prior to July 20, 1961, to attempt to dispose of Count II under §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, and the decision so stated.

The hearing examiner is now reissuing this decision as to Count I and is simultaneously issuing a separate decision as to Count II. That disposition of Count II is being made pursuant to §§ 3.21 and 3.25 of the Commission's Rules and pursuant to notice of intention filed by the parties prior to September 1, 1961. The initial decision as to Count II contains a cease-and-desist order which is sub-

ject to review and approval by the Federal Trade Commission before it becomes final and effective. However, the issuance of the initial decision as to Count II makes it possible to find, and the examiner hereby finds, that there is nothing further pending before him either as to Count I or as to Count II of this complaint.

Having made such findings, the examiner hereby reissues his initial decision as to Count I of the complaint, with certain minor changes, as follows:

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss Count I of the complaint.[1] That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under § 2(a) of the Clayton Act, as amended (15 U. S. C. § 13(a)).

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed his answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been either ordered or filed.

The hearing examiner finds and concludes from all the evidence:

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations

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[1] A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7000, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal, *CCH Trade Reg. Rep.*, par. 28,821.

of Count I of the complaint has failed to prove that the effect of respondent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition" as alleged in the complaint.

2. Respondent, United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, in the city of Melrose Park, State of Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division.

3. For the year ending December 31, 1959, respondent's gross sales were approximately $138 million, and the sales of its Sawyer Division accounted for approximately $12 million.

4. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1, 1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it granted discounts as follows:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more without regard to the amount of said customer's own monthly purchases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

5. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

6. Even though the operational practices and policies may vary from division to division, the corporate respondent, United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of § 2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease

and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

7. Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of the buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

8. The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales. The Commission witnesses, the above-named independent grocers, testified that they endeavored to keep their biscuit products priced at approximately the same level as their competitors; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive.

9. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of the chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears. There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof.

10. The competitive injury asserted by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. It is not clear whether the competitive injury is asserted as having been inflicted upon the independents vis-a-vis independents, or the independ-

ents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occurred, this record lacks any evidence of such injury due to respondent's discount schedules.

11. The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

12. The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by § 2(a). Had actual proof of such competitive injury been adduced, it would have supported a cease and desist order against respondent generally.

Respondent's discount schedules may constitute a price discrimination under § 2(a) of the Clayton Act according to *Anheuser-Busch* v. *FTC*, 363 U. S. 536, because a price discrimination within the meaning of § 2(a) is merely a price difference. However, at page 550 in Anheuser-Busch, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded Anheuser-Busch to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The Seventh Circuit, under date of January 25, 1961, held that the Anheuser-Busch record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling

law at this time. Although Anheuser-Busch involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, inter alia, said:

> "It is true that the effects of AB's [Anheuser-Busch's] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the *acts* themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself." (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F. T. C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging violation of § 2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

> "The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition 'there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered.'"

The evidence in this record does not show "wherein competition is substantially lessened and a monopoly fostered" by United's discount schedules. While the General Foods

case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 F. T. C. at 887).

Price differentials per se are not prohibited by § 2(a) of the Clayton Act, but only those price differentials having an actual or probable effect on competition. There is a highly respectable and commanding line of opinion to the effect that *Corn Products Refining Company* v. *FTC*, 324 U. S. 726 (1945); *Morton Salt Company* v. *FTC*, 334 U. S. 437 (1948); and *P. Sorenson Mfg. Co.*, 52 F. T. C. 1659, aff'd per curiam, *P. Sorenson Mfg. Co.* v. *FTC*, 246 F. 2d 687 (D. C. Cir. 1957) lead but to one conclusion, namely, that price discrimination among competing customers of the seller carries with it a conclusion of competitive injury per se (See Docket No. 7225, *Tri-Valley Packing Assn.*, opinion dated August 1, 1961, page 18) and that this per se principle is especially applicable in a highly competitive business such as the grocery business here involved. With all due respect to this high authority, this examiner respectfully suggests that if the Congress had intended price discrimination among competing customers of the seller to constitute per se violation under § 2 (a) it would have phrased §2(a) accordingly to give effect to that intent. In a footnote in *Sun Oil Co.* v. *FTC*, ... F.2d....; 30 L. W. 2060, 8/1/61 (July 24, 1961, C. A. 5), the court quotes authorities to the effect that the virtue of the Robinson-Patman Act may, like Roman law, "lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity." The Seventh Circuit's Second Opinion in Anheuser-Busch, supra, quoted, negates the notion that proof of competitive injury under § 2(a) may be found in such "middling obscurity." It cannot be based upon speculation and conjecture.

Section 2(a) requires that the effect on competition be substantial. As the court stated in *Whitaker Cable Corp.*

v. *Federal Trade Commission*, 239 F. 2d 253 (C. A. 7th 1956), at 256:

> "Congress has not outlawed price differentials per se, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved."

The Commission's cease and desist order was affirmed by the court in Whitaker.

A cumulative quantity discount was also involved in *Yale & Towne Mfg. Co.*, Docket No. 6232, 52 F. T. C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F. T. C. at 1604):

> "This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute

conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed."

In the Matter of *Fred Bronner Corporation,* Docket 7068, the Federal Trade Commission, on September 29, 1960, sustained the hearing examiner's dismissal of a complaint under § 2(a). In Bronner the Commission gives a definitive opinion of the implications of *Federal Trade Commission* v. *Morton Salt Company,* 334 U. S. 37 (1948); and Whitaker, holding, as to Morton Salt:

". . . The Court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.*" (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that respondent's products are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of proof of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In Bronner the Commission cited with approval the quotation reproduced (page 8) from Whitaker. The Commission also held:

> "Regardless of whether the court in the Whitaker case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the Whitaker case, 'Congress has not outlawed price differentials per se, unjustified though they may be.' Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the Whitaker and Edelmann [*E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (C. A. 7th 1956)] cases. . . ."

In the Edelmann case, the court held (page 155):

> ". . . Although it has been held that there is no automatic de minimis exception in Section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order [citing cases], it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. See our opinion in *Whitaker Cable Co.* v. *Federal Trade Commission*, 7 Cir., 239 F. 2d 253. But it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U. S. C. A. § 13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general. . . ."

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained

the burden of proof of competitive injury imposed upon him by law,

It Is Ordered that Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

Leon R. Gross,
Hearing Examiner.

November 6, 1961.

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(2) First Commission Opinion

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

Commissioners:

Paul Rand Dixon, *Chairman*
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

OPINION OF THE COMMISSION

By Anderson, Commissioner:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, dismissing the complaint as to Count I. The hearing examiner in the aforementioned initial decision sustained the respondent's motion of April 28, 1961, made at the close of the case in chief in support of the complaint, to dismiss Count I, stating that the ground for his action was the failure of the evidence to prove the competitive injury required to be shown under Section 2(a) of the amended Clayton Act.[1]

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[1] The hearing examiner refers to the filing of his initial decision as to Count II, under which decision, subject to Commission review, Count II would be disposed of pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice, published May 6, 1955.

Counsel in support of the complaint appeals, averring (1) that the examiner erred in failing specifically to find that respondent discriminated in price between competing customers, and (2) that he erred in failing to find that the price discriminations charged had the adverse effects proscribed by the statute and that a prima facie case had been proved. Said counsel requests that the initial decision be reversed and the case be remanded.

The complaint alleges in part that respondent discriminated in price between different purchasers of its biscuit products of like grade and quality and that such discriminations have been effectuated through the use of respondent's cumulative discount systems based on the dollar volume of the customer's monthly purchases. Respondent's answer does not challenge the fact that its Sawyer Division used in the designated periods the several discount schedules set out in the complaint. These schedules provided graduated discounts up to 6% for varying amounts of monthly purchases. They are as follows:

For the Period July 1, 1958, to June 30, 1959:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 129.99	4%
130.00 to 149.99	5%
150.00 and over	6%

In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount to such purchaser under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser. The discounts under these schedules will be referred to hereinafter as "volume" discounts.

The hearing examiner failed to make a specific finding that, as a result of such volume discounts, some customers were charged higher prices for like goods than others competing with such customers and that this constituted price discrimination under Section 2(a) of the amended Clayton Act. However, he clearly assumed such to be the fact; otherwise he would not have reached the injury question.

The present record amply supports a finding that respondent did discriminate in price as charged.[2] The evidence, while not limited to a single division of respondent, largely concerns the Sawyer Biscuit Company Division of United Biscuit Company of America (Sawyer Division), and so the following references are generally to the activities of that division. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year, Sawyer Division sold to 21,773 customers operating 23,664 outlets. It should be noted that the number of customers and outlets varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, i.e., the amount was credited to them which they also received at that time or later, and 13,716 neither earned nor received such a discount. Of those receiving volume discounts, many received less than 6%. For instance, in January 1959, retail grocery customers of re-

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[2] A price discrimination within the meaning of the phrase "discriminate in price" in Section 2(a) is merely a price difference. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 549 (1960).

spondent earned and, either then or later, received volume discount payments as follows:

3,718 customers	2%
2,287 customers	3%
704 customers	4%
310 customers	5%
1,038 customers	6%

Certain of the customers receiving no volume discount or less than 6% discount were in competition with one or more customers receiving the full 6%. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National).[3]

The evidence of record includes a showing as to price discriminations between and among competing customers in the trading areas of Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. Specific examples for two of the areas will be discussed below.

In Gary, Indiana, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. The record shows that Wally's earned, i.e., it was credited with and then or later received, the following volume dis-

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[3] Counsel supporting the complaint has included with his brief an appendix showing a comparison of purchase volumes and discounts of individual chain stores and independent grocery stores. Respondent apparently does not contest the accuracy of the figures in the appendix although it does contend that the schedule is not complete.

The record shows that of the 43 chain group purchasers listed in Commission Exhibit 120-A, including Kroger, A & P and National, all received 6% volume discounts for 1959 purchases except that for certain months—January, April, May, August, November and December—one corporate chain, not identified, did not receive the full 6% discount. Accordingly, the record will sustain a finding that, for 1959 purchases, all chains so listed in the months other than those mentioned received 6%; for the remaining months all chains so listed other than one received the 6%.

counts in various months in 1959: 3.0% in January and February, 2.0% in March, 0% in October, 1.5% in November, and 2.0% in December. There is no specific evidence as to the other months of 1959, although the owner of the store, Walter Pall, testified, in effect, that Wally's earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6% included Better Foods, Inc. (e.g., 1.5%, earned October 1959), Gene's Super Market (e.g., 3.5%, earned December 1959), and Tobe's Super Market (e.g., 3.5% earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6% discounts for purchases made at the same time, which favored customers included Kroger and A & P.

In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January 1959, if any, included the following:

Horvath's Self Service	3%
Vince's Super Saver	3%
Food Center	2%
A & J Market	0%
K & F Food Market	4%

Those who earned also received payments. Discounts under 6% or no discounts are also shown for other months in 1959 for these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time, which favored customers included Kroger and National.

In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Super Market in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on

smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. Another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3.00 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

The hearing examiner, in his consideration of whether the price discriminations so disclosed resulted in the competitive effect defined in the Act, erred in failing to apply the proper test to make this determination. He first cites *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961), and *General Foods Corp.*, 50 F. T. C. 885 (1954), to support his decision, but in light of the specifically applicable judicial authority to be mentioned hereafter, these cases are not controlling for this proceeding. While the hearing examiner refers to *Corn Products Refining Company, et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945), and *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), as well as *P. Sorensen Mfg. Co. Inc.*, 52 F. T. C. 1659 (1952), *aff'd per curiam, P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957), he does not apply the principles set forth in these cases and, in effect rejects the holdings.

Section 2(a) of the amended Clayton Act does not require a finding that price discriminations have in fact had an adverse effect on competition (there is no need, for instance, to show that a competitor has suffered financial losses or has been forced out of business); it is enough that they may have the prescribed effect. *Federal Trade Com-*

mission v. *Morton Salt Company, supra.* The "gone out of business" test is not a part of Section 2(a). To insist on any such requirement would be contrary to the purposes and intention of Congress in passing this legislation. A showing in the *Morton Salt* case that certain merchants had to pay the respondent therein substantially more for like goods than their competitors justified a finding of competitive injury within the meaning of the Act. In *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (8th Cir. 1956), the court in considering the question of injury to competition held in part as follows:

> "With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition." (Id. 51.)

See also *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir. 1956); *Whitaker Cable Corp.* v. *Federal Trade Commission,* 239 F. 2d 253 (7th Cir. 1956); *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F. 2d 674 (2nd Cir. 1959); *P. Sorensen Mfg. Co., Inc.* v. *Federal Trade Commission, supra.* Recently in *Tri-Valley Packing Association,* Docket Nos. 7225 and 7496 (1962), we held that in any case involving the effect of a price discrimination on competition between buyers the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case.

Fred Bronner Corporation, et al., Docket No. 7068 (1960), a Section 2(a) matter dismissed by the Commission for lack of a showing of competitive injury, differs from the secondary line injury cases cited above because the evidence in that matter was not such as to warrant a finding

that the price differential was substantial or competitively significant in the market.

Clearly, the test for competitive injury set forth in *Morton Salt* and applied in the automotive cases above mentioned should govern this proceeding.

We turn now to the facts shown in the present record. The majority of respondent's customers received no volume discount. Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified: ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record, such as 2%, 3 to 5% and 4 to 5%. A number of independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is testimony from such witnesses to the effect that if they could buy cheaper they could sell for less, and that customers will, in the over-all picture, buy where the prices are lower. Considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%.

On the basis of these facts, there is in the present record sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. We believe that the examiner's failure to so find was clearly erroneous. Unless the showing in the record is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the price discrimination practice charged.

The appeal of counsel supporting the complaint is granted. It is directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views herein expressed. An appropriate order will be entered.

Commissioner Elman concurred in the result of the decision of this matter.

June 28, 1962.

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(3) Second Initial Decision

BEFORE FEDERAL TRADE COMMISSION

* * (Caption—7817) * *

INITIAL DECISION UPON REMAND AS TO COUNT I.

Leon R. Gross, Hearing Examiner.

Ross, McGowan & O'Keefe, by Roland D. Whitman, Esq., of Chicago, Illinois, for Respondent.

Brockman Horne, Esq., for the Commission.

Preliminary Statement

The complaint which issued in this proceeding on March 10, 1960, alleged in Count I that respondent had violated subsection 2(a) of the Clayton Act, as amended, and, in Count II that respondent has violated subsection 2(d) of that Act, the pertinent parts of which Act read as follows:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such

discrimination, or with customers of either of them. * * *"

"(d) That it shall be unlawful for any person engaged in commerce, * * * to pay * * * anything of value * * * to a customer of such person * * * in consideration for any services or facilities furnished by or through such customer * * * unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

While counsel supporting the complaint (hereinafter designated "complaint counsel") was introducing evidence in support of the allegations in Count I, it was represented to the hearing examiner that Count II of the complaint would probably be disposed pursuant to § 3.21 and § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, by an agreement containing a consent order to cease and desist. Complaint counsel completed the introduction of evidence in support of his case-in-chief as to Count I. On April 23, 1961, respondent moved to dismiss Count I of the complaint, after complaint counsel had rested his case, on the grounds, among others, that complaint counsel's proof failed to establish the competitive injury or likelihood of competitive injury required to be shown.

On July 26, 1961, the hearing examiner issued an initial decision as to Count I granting respondent's motion to dismiss these proceedings on the grounds that the record did not at that time contain that degree of proof of competitive injury, or likelihood of competitive injury, required under the Statute.

In his July 26, 1961, initial decision as to Count I, the hearing examiner noted that counsel had informed him that they were taking steps to dispose of Count II by entering into an agreement containing a consent order to

cease and desist, and the examiner directed counsel to present such agreement to the examiner as provided by § 3.21 and §.3.25 of the Rules as promptly as possible.

On August 23, 1961, counsel for the parties filed with the Secretary of the Federal Trade Commission a notice of their intention to dispose of Count II of this complaint by signing an agreement containing a consent order to cease and desist.

On August 30, 1961, the Federal Trade Commission vacated and set aside the initial decision of July 26, 1961, as to Count I on procedural grounds. On November 6, 1961, this examiner issued two separate initial decisions. The initial decision as to Count I was in substantially the same language as the prior decision of July 26, and granted respondent's motion to dismiss the alleged violations of § 2(a); the initial decision as to the § 2(d) violations alleged in Count II of the complaint contained a cease and desist order.

On December 11, 1961, the Commission suspended the effective date of the initial decision as to Count II, until further order of the Commission.

On June 28, 1962, the Commission issued an order vacating the initial decision as to Count I and remanded the matter for further proceedings.

On October 1, 1962, a hearing on remand was convened in Washington, D. C., and both parties declined to introduce additional evidence at such hearing. The parties represented that they would not file proposed findings and conclusions as provided by Rule 4.17 but reserved their respective rights to present a form of appropriate order. Such suggested orders have been filed. The parties have fully reserved their respective rights of appeal from any order as may be herein entered.

The posture of the record at this time is that the parties have been accorded in all respects opportunity for a full hearing, and have completed the introduction of evidence.

Since the hearing examiner issued his November 6, 1961, decision in this case, the Federal Trade Commission has spoken authoritatively in its opinions in *Tri-Valley Packing Association,* Dockets 7225 and 7496, Commission's Opinion dated May 10, 1962; *American Oil Company,* Docket 8183, Commission's Opinion dated June 27, 1962, and its Opinion dated June 28, 1962, remanding this case.

In Tri-Valley, the Commission held (p. 8):

> "• • • In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase 'in the resale and distribution of respondent's products' unduly limits the scope of the order and should be deleted therefrom."

And on page 5:

> "In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission* v. *Morton Salt Company, supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (1956); *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (1956). • • •"

In American Oil, the Commission in its opinion (p. 3) interpreted *Morton Salt Co.* (334 U. S. 37 (1948)) as holding:

> "• • • in price discrimination cases involving competition between buyers, the requisite injury to such

> competition may be inferred from a showing that the seller charged one customer a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. * * *"

And in its opinion in the instant case, the Commission, in commenting on Tri-Valley, inter alia, said (p. 7):

> "* * * we hold that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitors for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case. * * *"

Based upon the entire record, the evidence, the exhibits, and admissions in briefs heretofore filed by the parties, the hearing examiner makes the following:

Findings of Fact.

1. Respondent United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale under its own brand name of cookies and crackers (hereinafter called "biscuit products"). For the year ending December 31, 1959, respondent's gross sales were approximately $138,000,000.

2. Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions each division is exclusively responsible for the sale of biscuit products within its respective area; determines its sales policy and pricing practices, and the discounts, if any, which are allowed to respondent's customers who resell at retail its

biscuit products in competition with each other. Respondent does not employ jobbers or distributors, but sells directly to retailers and delivers its products in its own trucks to the retailers.

3. Respondent's retail customers may be classified as (a) "Corporate chains," (b) "voluntary buying chains," (c) "supermarkets," and (d) "independently owned grocery stores." "Corporate chains" usually include multiple-unit retail grocery stores which utilize central buying and control. A "voluntary buying chain" usually refers to individually-owned retail grocery stores which "pool" their purchases in order to utilize central buying facilities without control of the day-to-day operation of the individual store members. "Supermarkets" are, roughly, individually-owned retail grocery concerns which operate more than one retail grocery store; an "independent" is an individually-owned retail grocery concern which usually operates only one retail store.

4. Although the evidence adduced by Commission counsel related chiefly to respondent's Sawyer Division, any violation of § 2(a) of the Clayton Act which is proven in this case against any of the eight divisions will sustain a cease-and-desist order against the corporate respondent. United Biscuit is legally responsible for the pricing practices and policies of each and all of its divisions. Its divisions are not separate corporate or legal entities, but are integrated parts of its overall operation.

5. Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the states of the United States including specifically Indiana and Wisconsin, and transports said biscuit products across state boundaries between respondent and its customers.

6. Respondent is engaged in commerce as "commerce" is defined in the Clayton Act, and, in the course and conduct

of its business in commerce respondent is, and for several years last past has been, in competition with other business concerns which manufacture and sell biscuit products in the same manner as, or in a manner similar to, that of respondent.

7. Respondent's Sawyer Division operates generally in an area composed of the State of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

8. From July 1, 1958 to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts based upon the dollar volume of the customer's monthly purchases. These schedules provided graduated discounts up to six percent for varying amounts of monthly purchases. Such schedules are:

For the period July 1, 1958, to June 30, 1959:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 39.99	2%
40.00 to 69.99	3%
70.00 to 99.99	4%
100.00 to 124.99	5%
125.00 and over	6%

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960:

Monthly Purchases	Discount
$ 00.00 to $ 24.99	0%
25.00 to 44.99	1½%
45.00 to 59.99	2%
60.00 to 74.99	2½%
75.00 to 89.99	3%
90.00 to 109.99	3½%
110.00 to 124.99	4%
130.00 to 149.99	5%
150.00 and over	6%

An independent grocery-store owner is allowed a discount based upon the total of his store or stores' purchases of respondent's biscuit products for a particular month. In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases. Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters which operationally conducts that chain's business in a particular area.

9. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year Sawyer sold to 21,773 customers, operating 23,664 outlets. The number of customers and outlets, of course, varies from month to month. During January, 1959, 8,057 Sawyer Division customers earned a volume discount; i.e., the amount was credited to them, and they received the discount either at that time or later. In that period, 13,716 Sawyer customers neither earned nor received such a discount. Of the customers receiving volume discounts, many received less than 6%.

10. In January, 1959, retail grocery customers of respondent earned, and, either then or later, received volume discount payments as follows:

3,718	customers	2%
2,287	"	3%
704	"	4%
310	"	5%
1,038	"	6%

Certain of the customers receiving no volume discount, or less than 6% discount, were in competition with one

or more customers receiving the full 6% discount. The favored customers included, inter alia, chain store organizations such as the Kroger Company, the Great Atlantic & Pacific Tea Company, and National Food Stores.

11. Most of the major retail grocery chain stores with seven or more outlets, purchasing from the Sawyer Division in 1959, and listed on CX 120-A and B, were allowed a 6% volume discount, although the independent stores which competed with the chain stores were allowed a lesser discount.

12. Owners of individually-owned grocery stores, in the cities of Burlington, Wisconsin, and South Bend and Gary, Indiana, who are not members of a buying group nor units of a corporate chain, testified concerning the general operations of their stores, with particular reference to their business relationships and practices with respondent. Such store owners were: In Burlington: Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana: Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; in South Bend, Indiana: Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

13. Although the retail dollar sales of respondent's biscuit products constitute a fractional percentage of the overall gross sales of some of the stores whose owners testified, the profit margin for the stores is very small. Some of the witnesses testified, and are uncontradicted in this record, that the net profit margin in the retail grocery business as an industry is low in relation to gross sales. Some of the independent store owners testified generally that they endeavor to keep their biscuit products priced at approximately the same level as their competitors, including chain stores but such chains provide especially strong competition for them, and over-all the retail grocery business is highly competitive.

14. The independent store owners are unable to match the over-all lower prices of the corporate chains on most items. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps; also, they cannot afford to advertise as extensively as the chains. Several independents testified they do no advertising at all except by signs and posters on their premises. These individual store owners are unable to match the chain stores' expensive plants, air conditioned premises in some instances, ample parking lots, larger and more attractive display areas, and other features, which cause the chains to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, such advantages as the independents might have enjoyed by staying open longer hours also cease to exist.

15. Many complex factors enter into the ability of an independent grocery-store operator to compete successfully with the corporate chains and the members of the buying groups. One store owner testified: "We have to fight not only for pennies but for fractions." Independent store witnesses testified that the price at which they purchase their merchandise is a very important, if not the most important, factor in determining whether they are able to compete.

16. Although the dollar differences in the amount of the dollar discounts paid to the independents as against the chains and buying groups may not be substantial, the percentage differences in the amount of discount received, and, therefore, initial cost to the independent store owner, may be substantial.

17. A comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores made by complaint counsel in Appendix A to his brief, and unchallenged by respondent, shows the following:

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
25-K	Kroger Company 628	Gary, Ind.	Jan. 1959	$ 43.42	$	6.0%	100.0%
25-D	Wally's Fifth Avenue Mart	Gary, Ind.	Jan. 1959	45.37	1.95	3.0	
89-K	Kroger Company 628	Gary, Ind.	Feb. 1959	47.28	4.07	6.0	100.0
89-D	Wally's Fifth Avenue Mart	Gary, Ind.	Feb. 1959	43.21		3.0	
99-A	A & P	Gary, Ind.	Oct. 1959	26.28		6.0	300.0
99-E	Better Foods	Gary, Ind.	Oct. 1959	28.35	2.07	1.5	
99-A	A & P	Gary, Ind.	Oct. 1959	26.28		6.0	140.0
99-B	Gene's Certified Supermart	Gary, Ind.	Oct. 1959	66.83	40.55	2.5	
100-A	A & P	Gary, Ind.	Nov. 1959	50.60		6.0	71.4
100-C	Tobe's Super Market	Gary, Ind.	Nov. 1959	99.93	49.33	3.5	
101-A	A & P	Gary, Ind.	Dec. 1959	57.33		6.0	200.0
101-D	Wally's Fifth Avenue Mart	Gary, Ind.	Dec. 1959	58.30	0.97	2.0	
101-A	A & P	Gary, Ind.	Dec. 1959	57.33		6.0	71.4
101-B	Gene's Super Market	Gary, Ind.	Dec. 1959	106.05	48.72	3.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	0.56		6.0	300.0
100-E	Better Foods	Gary, Ind.	Nov. 1959	25.02	24.46	1.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	0.56		6.0	71.4
100-C	Tobe's Super Market	Gary, Ind.	Nov. 1959	99.93	99.37	3.5	
100-H	Kroger Company 628	Gary, Ind.	Nov. 1959	10.56		6.0	300.0
100-D	Wally's Fifth Avenue Mart	Gary, Ind.	Nov. 1959	26.64	25.68	1.5	
101-H	Kroger Company 628	Gary, Ind.	Dec. 1959	14.86		6.0	71.4
101-B	Gene's Super Market	Gary, Ind.	Dec. 1959	106.05	91.19	3.5	
101-H	Kroger Company 628	Gary, Ind.	Dec. 1959	14.86		6.0	200.0
101-D	Wally's Fifth Avenue Mart	Gary, Ind.	Dec. 1959	58.30	43.44	2.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	$29.44	$-	6.0%	50.0%
66-B	K & F Food Market	So. Bend, Ind.	Jan. 1959	72.73	43.29	4.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	39.06	3.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	26.64	3.0	
66-L	Kroger Store F 98	So. Bend, Ind.	Jan. 1959	29.44	0.26	6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18		2.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08	6.48	6.0	
66-A	A & J Market	So. Bend, Ind.	Jan. 1959	15.60		—0—	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	50.0
66-B	K & F Market	So. Bend, Ind.	Jan. 1959	72.73	50.65	4.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	46.42	3.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	34.00	3.0	
66-L	Kroger Store F 105	So. Bend, Ind.	Jan. 1959	22.08		6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18	7.10	2.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	50.0
66-B	K & F Food Market	So. Bend, Ind.	Jan. 1959	72.73	44.98	4.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	100.0
66-B	Horvath's Self Service	So. Bend, Ind.	Jan. 1959	68.50	40.75	3.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	100.0
66-B	Vince's Super Saver	So. Bend, Ind.	Jan. 1959	56.08	28.33	3.0	
66-M	National Food Store 44	So. Bend, Ind.	Jan. 1959	27.75		6.0	200.0
66-C	Food Center	So. Bend, Ind.	Jan. 1959	29.18	1.43	2.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	$33.36	$10.70	6.0%	%
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66		—0—	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	51.76	4.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	21.55	3.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36		6.0	100.0
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	8.50	3.0	
67-L	Kroger Store F 98	So. Bend, Ind.	Feb. 1959	33.36	10.52	6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84		—0—	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66	2.14	—0—	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	64.60	4.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	34.39	3.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	100.0
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	21.34	3.0	
67-L	Kroger Store F 105	So. Bend, Ind.	Feb. 1959	20.52		6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84	2.32	—0—	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11	6.45	6.0	
67-A	A & J Market	So. Bend, Ind.	Feb. 1959	22.66		—0—	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11		6.0	50.0
67-A	K & F Food Market	So. Bend, Ind.	Feb. 1959	85.12	56.01	4.0	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11		6.0	100.0
67-B	Horvath's Self Service	So. Bend, Ind.	Feb. 1959	54.91	25.80	3.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	$29.11	$	6.0%	100.0%
67-B	Vince's Super Saver	So. Bend, Ind.	Feb. 1959	41.86	12.75	3.0	
67-M	National Food Store 44	So. Bend, Ind.	Feb. 1959	29.11	6.27	6.0	
67-C	Food Center	So. Bend, Ind.	Feb. 1959	22.84		—	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	30.31	3.0	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	9.63	2.0	
68-L	Kroger Store F 98	So. Bend, Ind.	Mar. 1959	25.78	4.44	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—0—	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	25.88	3.0	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	5.20	2.0	
68-L	Kroger Store F 105	So. Bend, Ind.	Mar. 1959	30.21	8.87	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87		6.0	100.0
68-B	Horvath's Self Service	So. Bend, Ind.	Mar. 1959	56.09	22.22	3.0	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87		6.0	200.0
68-B	Vince's Super Saver	So. Bend, Ind.	Mar. 1959	35.41	1.54	2.0	
68-M	National Food Store 44	So. Bend, Ind.	Mar. 1959	33.87	12.53	6.0	
68-C	Food Center	So. Bend, Ind.	Mar. 1959	21.34		—	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	$49.70	$ 3.56	6.0%	200.0%
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14		2.0	
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	49.70		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	21.73	2.5	
106-D	Kroger Store F 98	So. Bend, Ind.	Oct. 1959	49.70		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	2.93	2.0	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98	1.84	6.0	200.0
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14		2.0	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	23.45	2.5	
106-D	Kroger Store F 105	So. Bend, Ind.	Oct. 1959	47.98		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	4.65	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	
106-A	A & J Market	So. Bend, Ind.	Oct. 1959	18.45	15.45	—	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	200.0
106-A	K & F Food Market	So. Bend, Ind.	Oct. 1959	46.14	43.14	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	140.0
107-A	Horvath's Self Service	So. Bend, Ind.	Oct. 1959	71.43	68.43	2.5	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	200.0
106-A	Vince's Super Saver	So. Bend, Ind.	Oct. 1959	52.63	49.63	2.0	
106-D	National Food Store 44	So. Bend, Ind.	Oct. 1959	3.00		6.0	
106-B	Food Center	So. Bend, Ind.	Oct. 1959	24.05	21.05	—	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	$39.00	$	6.0%	300.0%
108-A	K & F Market	So. Bend, Ind.	Nov. 1959	41.09	2.09	1.5	
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	39.00	4.15	6.0	300.0
109-A	Horvath's Self Service	So. Bend, Ind.	Nov. 1959	34.85		1.5	
108-D	Kroger Store F 105	So. Bend, Ind.	Nov. 1959	39.00		6.0	200.0
108-A	Vince's Super Saver	So. Bend, Ind.	Nov. 1959	58.06	19.06	2.0	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	140.0
110-A	K & F Food Market	So. Bend, Ind.	Dec. 1959	63.90	16.31	2.5	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	140.0
111-A	Horvath's Self Service	So. Bend, Ind.	Dec. 1959	67.65	20.06	2.5	
110-C	Kroger Store F 105	So. Bend, Ind.	Dec. 1959	47.59		6.0	100.0
110-A	Vince's Super Saver	So. Bend, Ind.	Dec. 1959	77.40	29.81	3.0	
77-A	A & P	Burlington, Wisc.	Jan. 1959	79.93		6.0	50.0
77-A	Grossman Foods	Burlington, Wisc.	Jan. 1959	84.43	4.50	4.0	
77-A	A & P	Burlington, Wisc.	Jan. 1959	79.93		6.0	50.0
77-A	Hillside Grocery Co.	Burlington, Wisc.	Jan. 1959	90.36	10.43	4.0	

COMPARISON OF PURCHASE VOLUMES AND DISCOUNTS OF INDIVIDUAL CHAIN STORES WITH PURCHASE VOLUMES AND DISCOUNTS OF INDEPENDENT GROCERY STORES.

Commission Exhibit Number	Purchaser	Location	Date	Purchases	Greater Purchases in terms of dollar amount	Discount	Greater Discounts in terms of percentage
86-A	A & P	Burlington, Wisc.	Feb. 1959	$ 77.31	$ 7.64	6.0%	100.0%
86-A	Grossman Foods	Burlington, Wisc.	Feb. 1959	69.67		3.0	
86-A	A & P	Burlington, Wisc.	Feb. 1959	77.31		6.0	50.0
86-A	Hillside Grocery Co.	Burlington, Wisc.	Feb. 1959	94.48	17.17	4.0	
87-A	A & P	Burlington, Wisc.	Mar. 1959	79.06	28.45	6.0	100.0
87-A	Grossman Foods	Burlington, Wisc.	Mar. 1959	50.61		3.0	
87-A	A & P	Burlington, Wisc.	Mar. 1959	79.06		6.0	50.0
87-A	Hillside Grocery Co.	Burlington, Wisc.	Mar. 1959	95.81	16.75	4.0	
88-A	A & P	Burlington, Wisc.	Oct. 1959	72.06		6.0	71.4
88-A	Grossman Foods	Burlington, Wisc.	Oct. 1959	100.99	28.93	3.5	
88-A	A & P	Burlington, Wisc.	Oct. 1959	72.06		6.0	50.0
88-A	Hillside Grocery Co.	Burlington, Wisc.	Oct. 1959	124.03	51.97	4.0	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53	7.55	6.0	140.0
89-A	Grossman Foods	Burlington, Wisc.	Nov. 1959	67.98		2.5	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53	46.78	6.0	50.0
89-A	Hillside Grocery Co.	Burlington, Wisc.	Nov. 1959	122.31		4.0	
89-A	A & P	Burlington, Wisc.	Nov. 1959	75.53		6.0	71.4
89-A	Spiegelhoff Super Market	Burlington, Wisc.	Nov. 1959	105.97	30.44	3.5	
90-A	A & P	Burlington, Wisc.	Dec. 1959	67.32		6.0	71.4
90-A	Hillside Grocery Co.	Burlington, Wisc.	Dec. 1959	96.99	29.67	3.5	
90-A	A & P	Burlington, Wisc.	Dec. 1959	67.32		6.0	50.0
90-A	Spiegelhoff Super Market	Burlington, Wisc.	Dec. 1959	111.42	44.10	4.0	

18. As a result of the respondent's volume discounts, hereinabove described, some of the respondent's customers were charged higher net prices for respondent's goods of like grade and quality than were other of respondent's customers, competing with such unfavored customers. This constitutes a price discrimination under § 2(a) of the amended Clayton Act. (*F. T. C.* v. *Anheuser Busch, Inc.*, 366 U. S. 536 (1960).)

19. In Gary, Indiana, Wally's Fifth Avenue Mart earned, was credited with, and either then or later received, the following volume discounts in various months of 1959: 3.0% in January and February; 2.0% in March; 0% in October; 1.5% in November and 2% in December. Although there is no specific evidence as to the other months of 1959, Walter Pall, the store's owner, testified, in effect, that Wally's earned only lower volume discounts. Other stores in Gary receiving discounts under 6% included: Better Foods, Inc., Gene's Supermarket, and Toby's Supermarket. These stores were each competing with one or more of respondent's customers receiving 6% discount for purchases made at the same time. These favored customers included Kroger and A & P.

20. In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January, 1959, if any, included the following:

Horvath's Self Service	3%
Vince's Super Saver	3%
Food Center	2%
A & J Market	0%
K & F Food Market	4%

Those who earned the discounts received the payments indicated. The evidence proves discounts under 6%, or no discounts, were given in 1959 to some or all of these cus-

tomers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time. These favored customers included Kroger and National.

21. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Supermarket in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

22. As a result, *inter alia,* of the aforementioned differences in volume discounts allowed to its customers, respondent charged some of its customers a higher net price for goods of like grade and quality than it charged a competing customer or customers. Thereby the competitive ability of the non-favored customers was injured or destroyed.

23. A preponderance of the reliable, probative and substantial evidence in the record proves, and the hearing examiner hereby finds, that respondent, by engaging in the acts and practices hereinabove described and set forth, has discriminated in price between different purchasers of its commodities of like grade and quality, and the effect thereof may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy and prevent competition between its customers in violation of § 2(a) of the Clayton Act, as amended.

24. The hearing examiner further finds that such price discrimination by respondent was not made in good faith to meet an equally low price of a competitor. The hearing examiner therefore reaches the following:

Conclusions.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest.

In the manufacture and sale of its biscuit products, respondent, United Biscuit Company of America, is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

In the manufacture and sale of its biscuit products in commerce, respondent, by means of the acts and practices hereinabove found, and by means of its discount schedules, and other acts related above, has discriminated in price between different purchasers of its products of like grade and quality by selling its said products to some of its customers at lower prices than it sells like products to other of its customers competing with the favored customers in the retail sale of such products. Such acts and practices constitute price discrimination in violation of § 2(a) of the Clayton Act, as amended.

The effect of such price discrimination may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy, and prevent competition in violation of § 2(a) of the Clayton Act, as amended.

Now, therefore,

It Is Ordered that United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products, including cookies and crackers, in commerce, as

"commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price.

LEON R. GROSS,
Hearing Examiner.

November 9, 1962.

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(4) Second Commission Opinion

BEFORE FEDERAL TRADE COMMISSION

• • (Caption—7817) • •

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

OPINION OF THE COMMISSION.

By ANDERSON, *Commissioner:*

This matter is before us upon the exceptions of respondent to the hearing examiner's initial decision as to Count I of the complaint, filed November 9, 1962, holding respondent in violation of Section 2(a) of the Clayton Act, as amended, and ordering it to cease and desist from discriminations in price.[1]

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[1] The hearing examiner filed his initial decision as to Count II of the complaint on November 13, 1961, which is an initial decision based on an agreement containing a consent order to cease and desist. The Commission stayed the effective date of this decision on December 7, 1961. The initial decision as to Count II will be adopted as the decision of the Commission by an order to be issued simultaneously with the order disposing of this proceeding as to Count I of the complaint.

The Commission, on June 28, 1962, vacated a prior initial decision as to Count I, filed November 13, 1961, and remanded the matter to the hearing examiner for further proceedings in conformity with the views expressed by the Commission therein. The Commission held that on the basis of the facts in the record at that time there was sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. The Commission further held that unless such showing is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the discriminations in price charged in the complaint.

No further evidence was presented by either party at the time fixed for hearing on remand, October 1, 1962. The hearing examiner thereafter, on November 9, 1962, filed his initial decision upon remand as to Count I, and it is as to this decision that respondent now files its exceptions.

A brief summary of the facts in this matter follows. Respondent, United Biscuit Company of America, a Delaware corporation with its principal office at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies and crackers under its own brand name, Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. Its net sales in the year ending December 31, 1959, were approximately $138,000,000.

Respondent, through its Sawyer Biscuit Division (Sawyer Division) during the period covered by the complaint, used discount schedules in connection with its sales which provided graduated or "volume" discounts to purchasers

of up to 6 percent for varying amounts of monthly purchases. In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser.

Respondent, by reason of the use of the aforementioned discount schedules, discriminated in price between different purchasers of its biscuit products of like grade and quality. The evidence largely concerns the operations of the Sawyer Division which operates generally in the states of Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin and Michigan. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year it sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, however, varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, which amount was credited to them and received either at that time or later. In the same month 13,716 Sawyer Division customers neither earned nor received such a discount.

Of the customers receiving volume discounts, many received less than 6 percent. For instance, in January, 1959, retail grocery customers of respondent earned and either then or later received volume discount payments as follows: 3,718 customers—2 percent, 2,287 customers—3 percent, 704 customers—4 percent, 310 customers—5 percent, 1,038 customers—6 percent. Certain of the customers receiving no volume discount or less than 6 percent were in competition with one or more customers receiving the full 6 percent. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National). With one exception, all of the major retail grocery chain stores with seven or more out-

lets purchasing from the Sawyer Division in 1959, including such stores as Kroger, A & P and National, were allowed a 6 percent volume discount.

The record shows price discriminations between and among competing customers in the trading areas of Gary, Indiana, South Bend, Indiana, and Burlington, Wisconsin. The Gary, Indiana, market will serve as an illustration. There, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. Wally's was credited with the following volume discounts in various months in 1959: 3.0 percent in January and February, 2.0 percent in March, 0 percent in October, 1.5 percent in November, and 2.0 percent in December. In other months that year Wally's apparently earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6 percent included Better Foods, Inc. (e.g., 1.5 percent earned October 1959); Gene's Super Market (e.g., 3.5 percent earned December 1959); and Tobe's Super Market (e.g., 3.5 percent earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6 percent discounts for purchases made at the same time, which favored customers included Kroger and A & P. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving the 6 percent. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

Independent store owners testified generally as to the highly competitive nature of the retail food business. Net

profits are low and cash discounts and other allowances are important. One store owner witness testified ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record. Certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is also testimony from such witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the over-all picture, buy where the prices are lower.

The examiner, in his initial decision as to Count I, filed November 9, 1962, held that, as a result of respondent's price descriminations, the competitive ability of the nonfavored customers was injured or destroyed. He concluded therefore that respondent violated Section 2(a) of the Clayton Act, as amended. This initial decision as to Count I filed November 9, 1962, is the decision before us for review on the appeal of the respondent and it is the "initial decision" hereafter referred to unless otherwise indicated.

Respondent takes exception (1) to certain portions of the initial decision relating to the nature of the price discriminations, (2) to the examiner's findings and conclusions as to competitive injury, (3) to the findings that respondent's price discriminations were not made in good faith to meet the equally low price of a competitor, and, finally, (4) to the scope of the order.

To begin with, respondent objects to the numbered paragraphs 2, 3, and 9, or parts thereof, on the ground that these contain a finding that discount schedules of respondent's Sawyer Division applied to all its retail customers. We do not interpret the paragraphs cited as making any such finding, and therefore reject the exception so made. To avoid any possible question in the matter,

however, we hold that the evidence does not show that the challenged discount schedules were used by any of respondent's divisions except the Sawyer Division.

Respondent next objects to asserted findings in paragraphs numbered 3, 8, and 16 of the initial decision, that customers of respondent's Sawyer Division that are members of voluntary groups pool their purchases from respondent and that they are treated like corporate chains with respect to the aggregation of purchases. Apparently, the main contention here centers around the examiner's statement, in paragraph 8, which reads, "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases." Such payments were provided for in a schedule adopted July 1, 1960. Complaint counsel takes the position that the evidence in the record does not relate to that more recent schedule, and he urges that the finding contained in the sentence above quoted is not necessary to the decision. Considering all the factors, we conclude that such finding should be stricken. Respondent's exception will be sustained to that extent on this point.

Respondent excepts to the asserted implication, in numbered paragraph 22 and the third paragraph of the conclusions in the initial decision, that it has discriminated in price by acts and practices other than the employment of its volume discount schedules. It contests in effect the use of the term "inter alia" in numbered paragraph 22 and the phrase "and other acts related above" in the third paragraph of the conclusions. Complaint counsel answers that any such finding and conclusion may have had reference to the one percent payment to voluntary group headquarters referred to in the finding quoted in the prior

paragraph. Such finding is to be stricken and there is no other evidence to support the broader holding which the examiner apparently has made and which respondent objects to. Accordingly, the initial decision will be modified by striking the aforementioned words.

An exception is next taken to the finding in numbered paragraph 23 and to the conclusion in the initial decision that the effect of respondent's practices may be to "tend to create a monopoly." Complaint counsel does not oppose dropping this holding from the decision, and since the evidence fails to clearly support a finding and conclusion as to a tendency to monopoly, the initial decision will be amended by striking such references.

Respondent's exception to the hearing examiner's failure to find that the price discriminations consisted only of a favoring of corporate chains against independents by permitting chains to combine purchases is disallowed. The reason is that such was not the basis for the finding of unlawful price discriminations. The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases.

Respondent next objects to the findings on the likelihood of competitive injury. The hearing examiner's findings are made in accordance with the Commission's views as set forth in the decision on remand. We see no reason to disturb them. See also the recent decision in *Muller Co.* v. *Federal Trade Commission,* 323 F. 2d 44 (7th Cir. 1963).

Respondent further excepts to the omission by the examiner of certain findings, namely, those in numbered paragraphs 8, 9, and 11 of his initial decision as to Count I, filed November 13, 1961, asserting that these negate his present conclusion. In these paragraphs the examiner

found, for instance, that sales of respondent's products are a fractional percentage of the gross sales of an independent store, that some of the independent stores might be growing in volume, and that witnesses for some of the independent stores testified they were not injured. Not all of the findings in such paragraphs, including the examples given, would be inconsistent with the holding of a likelihood of competitive injury. Nevertheless, after the examiner had reconsidered the issues in the light of the views expressed by the Commission, he saw fit not to make certain of the same findings appearing in his prior initial decision. We believe that the findings and conclusions he has made in the initial decision now before us are correct except as noted herein and therefore reject respondent's exceptions made on this question.

The examiner finds in numbered paragraph 24 in the initial decision that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor. To this, respondent takes exception claiming that it did not tender evidence in proof of this defense and that the finding therefore is not within the scope of the proceeding. Since there is no basis in the record for this finding, it will be stricken. Nevertheless, respondent has had the opportunity to raise the good faith meeting of competition defense and has not done so; thus, it is foreclosed from again raising such defense on the same or substantially similar facts. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 476-477 (1952).

Respondent lastly challenges the scope of the order. It argues that the order should be limited (1) to biscuit products, (2) to retail grocery customers as purchasers, and (3) to price discriminations between chain stores and independents by means of quantity discounts which aggregate the purchases of chain store outlets. Respondent also contends that the order should not prohibit all price discriminations without regard to the likelihood of adverse

competitive effect. Counsel supporting the complaint opposes all such limitations, except that as to product coverage, and on this question he believes the order should appropriately encompass "food products" rather than the product coverage in the initial decision, which is "their products, including cookies and crackers." Said counsel also asks that the phrase "in resale of such products" be inserted at the end of the order.

We agree with the recommendations of complaint counsel for modification of the initial order. Plainly, the Commission's order should be broad enough to prohibit not only the further use of the precise practice found to have existed in the past but also the future use of related and similar practices. Cf. *Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F. 2d 337 (7th Cir. 1960), cert. denied, 364 U. S. 883 (1960); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission,* 311 F. 2d 480 (2d Cir. 1962). The proposal of the respondent would limit the scope of the order to such a degree that it would not even cover the whole of the area of illegality found. The price discriminations disclosed in the record consist of all those resulting from the use of volume discount schedules and not just the price differences where the purchases of multiple chain outlets were combined for the purpose of discounts.

Respondent's objection to the order on the ground that it prohibits price discrimination without regard to whether the discrimination has an adverse effect on competition is rejected because such a qualification has no place in a Commission Section 2(a) order. The likelihood of competitive injury is a fact question for the Commission to determine as a basis for the order, and the Commission cannot shift to the courts a responsibility in enforcement proceedings of trying such issues. *Federal Trade Commission* v. *Morton Salt Company,* 334 U. S. 37, 54 (1948).

In connection with the product coverage of the order, the Commission may frame its order to prohibit the use of the illegal practice in conjunction with respondent's sale of any and all products. *Niresk Industries, Inc.* v. *Federal Trade Commission, supra,* at page 343; *Mueller Co.* v. *Federal Trade Commission, supra; Carter Products, Inc.* v. *Federal Trade Commission,* 323 F. 2d 523 (5th Cir. 1963). The propriety of such an order, however, depends upon the circumstances in the proceeding. *Carter Products, Inc.* v. *Federal Trade Commission, supra, cf. Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission, supra; The Quaker Oats Co.,* Docket No. 8119, decided April 25, 1962.

In the circumstances of this case, we believe a more limited order is appropriate, namely, an order covering "food products." Respondent urges that the order should be limited to biscuit products, i.e., crackers and cookies, but this would so narrow the order that the same practices engaged in as to any other product, even as to closely related products, would not be covered and would require a whole new proceeding to prohibit violations of law. Complaint counsel urges, and respondent does not dispute, that one of respondent's competitors is presently engaged in the sale of potato chips. If such a product is introduced in a competitor's line, it is not improbable that respondent might similarly expand its line. The Commission's order should at least be broad enough to cope with such related products. *Cf. Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. 2d 968, 971-972 (3d Cir. 1941); *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43, 52-53 (8th Cir. 1956), aff'd, 355 U. S. 411 (1958). An order covering "food products" will be clear and precise as to the products to which it applies and sufficiently comprehensive to cover products related to those for which the violation is found. Yet, it is not so broad as to extend into all possible facets of respondent's business, regardless of the relationship to the practices herein found to be unlawful.

There is an objection by respondent to the inclusion of all purchasers in the order, rather than only retail grocery customers. Respondent, as found by the examiner, sells not only to retail grocery concerns but to restaurants as well. We agree that the qualifying phrase "in the resale of such products" should be added at the end of the order. Thus the order will be limited to customers competing in the resale of respondent's products and will not apply to sales to restaurants for their own use. Respondent's exception to the order on this question is granted to the extent indicated but not otherwise.

The exceptions of the respondent are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and, as modified, will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurred in the result and Commissioner Reilly did not participate for the reason he did not hear oral argument.

February 7, 1964.

(5) Final Order of the Commission

BEFORE FEDERAL TRADE COMMISSION

* * (Caption—7817) * *

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

FINAL ORDER AS TO COUNT I.

This matter having come on to be heard upon the exceptions of respondent to the hearing examiner's initial decision upon remand as to Count I, filed November 9, 1962, and upon briefs and oral argument in support of and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the respondent's exceptions, and having directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It Is Ordered that the sentence in the finding numbered 8 in the initial decision, reading "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases" be, and it hereby is, striken.

It Is Further Ordered that the term "inter alia" in the first line in the finding numbered 22 in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the phrase "and other acts related above," in the third and fourth lines of the third paragraph in the Conclusions in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the phrases "tend to create a monopoly," in the seventh line of the finding numbered 23 and the second line of the fourth paragraph in the Conclusions in the initial decision be, and they hereby are, stricken.

It Is Further Ordered that the first sentence in the finding numbered 24 in the initial decision be, and it hereby is, stricken.

It Is Further Ordered that the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

> It Is Ordered that the United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

It Is Further Ordered that the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a

report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

By the Commission, Commissioner Elman concurring in the result and Commissioner Reilly not participating for the reason he did not hear oral argument.

JOSEPH W. SHEA,
Secretary.

(Seal)

Issued: February 7, 1964.